NO. 22193

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN L. SULLIVAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLANT'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On December 14, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in four counts against the defendant for the following offenses:

Count One: For wilfully and knowingly attempting to evade and defeat tax due and owing to the United States for the calendar year 1960, by filing a false and fraudulent income tax return in violation of Title 26, United States Code, Section 7201.

Count Two: For wilfully and knowingly attempting to defeat and evade tax due and owing United States by filing a false and fraudulent income tax return for the calendar year 1961, in violation of Section 7201, Title 26, United States Code.

Count Three: For wilfully and knowingly attempting to defeat and evade tax due and owing United States by filing a false and fraudulent income tax return for the calendar year 1962, in violation of Title 26, United States Code, Section 7201.

Count Four: For wilfully and knowingly attempting to defeat and evade the income tax for the calendar year 1963, by filing a false and fraudulent income tax return for the calendar year 1963, in violation of Section 7201, Title 26, United States Code (CT 2-6). 1/

On January 3, 1967, defendant was arraigned (CT 7) and on January 16, 1967, defendant entered pleas of not guilty as to all four counts (CT 19). Trial by jury was set for June 5, 1967 (CT 22), and on June 5, 1967, the trial was continued to June 6, 1967 (CT 29).

On June 6, 1967, a jury was impanelled and sworn (CT 33), and on June 8, 1967, at 1:45, defendant moved for judgment of acquittal at the close of the government's case, which the court

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1/ CT - refers to page of Clerk's Transcript.

took under submission (CT 35). On June 13, 1967, the case was given to the jury for their deliberations at 2:15 P. M. (CT 55).

On June 13, 1967, at 4:50 P. M., court reconvened, the court admonished the jury and separated them with orders to return directly to the Jury Room at 9:30 A. M. on June 14, 1967, for further deliberations, and court adjourned (869). 2/

On June 14, 1967, at 11:37 A. M., the court gave further instructions to the jury (872-878). At 2:45 P. M. on said date, the court gave further instructions (879-883), which included the "Allen" instruction. At 4:25 P. M. the verdict was returned by the jury with the defendant being found not guilty on Counts One and Two and guilty as to Counts Three and Four, and the court denied defendant's motions for acquittal taken theretofore under submission (CT 56).

On July 24, 1967, post-trial motions were argued, submitted and denied (RT 4-28). 3/ On July 28, 1967, the defendant was sentenced to two years in custody on Counts Three and Four, to run concurrently, on the condition that the defendant be confined for a period of thirty days with the execution of the remainder of the sentence of imprisonment suspended, and defendant placed on two years probation. On July 28, 1967, a timely notice of appeal was filed by the defendant (CT 81).

Jurisdiction of the District Court is based on Title 26,

2/ (---) - refers to page of Reporter's Transcript.

3/ (RT) - refers to Reporter's Transcript of July 24 and 28, 1967.

United States Code, Section 7201, and on Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

II

STATUTES INVOLVED

Title 26, United States Code, Section 7201 reads as follows:

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00 or imprisonment of not more than five years, or both, together with costs of prosecution."

III

QUESTIONS PRESENTED

1. Did the Court err in failing to rule on defendant's motion for acquittal made at the conclusion of the government's case under Rule 29a?

2. Did the Court err in allowing the jury to separate after it began to deliberate?

3. Did the Court err in failing to give the complete

"Allen Instruction" so as to prejudice defendant?

4. Is the verdict contrary to the weight of the evidence?

IV

STATEMENT OF THE FACTS

(Government's Case)

On June 6, 1967, there was filed in the trial a stipulation concerning government's Exhibits 1, 2, 3 and 4, the income tax returns of defendant for the years 1960, 1961, 1962 and 1963 (CT 30, 31 and 32).

Witness JOHN M. HORNER was called and testified for the Government that he prepared Exhibits 1 through 4 (132); that the information contained on the returns were wholly received from the defendant (135).

FREDERICK WERDER testified that he operates the GOURMET RESTAURANT; identified the business records of the corporation relating to salary checks of the defendant (141); testified relating to a bonus arrangement with the defendant (141); identified salary advances made to the defendant (144), and expense checks (145); that defendant is the executive chef (146); stated that many thousands of dollars in salary advances were made to the defendant in the period 1960 through 1963; that the advances for 1960 through 1963 were repaid subsequently (149), explained the duties of an executive chef (150) and that defendant was responsible for purchasing of supplies namely, meat, vegetables, but no equipment (151);

that within reason the defendant had discretion as to what supplier was to be used (152); that defendant was required to purchase from certain suppliers up to a proportion of approximately 25 per cent (153); that defendant was not required to purchase from PHILLIPS POULTRY (153). He desired that defendant purchase some meats from MORRIS RATNER (154); defendant was not required to purchase from SOUTHERN CALIFORNIA TRADING or DOUGLAS BROS.; defendant was required to purchase from ROYAL PRIME STEER (155); that in checking prices, WERDER found that the defendant's purchasing policies were fair and that the pricing from the purveyors was in line with the prevailing prices and the same were constantly checked through WERDER's auditing department (157); that he received no complaints from COAST POULTRY, DOUGLAS BROS. or PHILLIPS POULTRY that defendant demanded from them for money in exchange for orders from them (158); that Defendant is the president of the Chef's Association (158); that the defendant went to conventions at his direction (159); that accumulated checks of defendant of up to $3500.00 were held by WERDER (161); that MORRIS RATNER is a shareholder of C. A. W. Corporation (161); that there were other parties who do purchasing for the GOURMET RESTAURANT other than the defendant (161).

On redirect examination, WERDER testified that he received no complaints from suppliers that defendant was requesting money (162-3), but that a supplier told him that defendant had borrowed some money and repaid it back (163).

HARRY PHILLIPS of PHILLIPS POULTRY COMPANY

testified for the government (166), that he knew the defendant since 1955; that his relationship with the defendant was business (168); that the defendant placed orders with him on the telephone for poultry or eggs; that he gave sums of money to the defendant (168) beginning about 1957, when the defendant asked for a loan due to an accident that he had (168-9); that he advanced money to defendant; that there were no notes or any documents signed; no agreement for repayment and no interest was discussed; that he has not been paid back the sum of either $300.00 or $400.00 (169); identified the business records of PHILLIPS POULTRY; that the business records reflect a $400.00 bad debt to the defendant (173); that defendant made some payments on the loan from time to time (174); that he could not identify the entries made on the books (174-5); that he wired $200.00 plus the telegraph charges to the defendant in Las Vegas (177); that he directed that the $203.52 check involving the funds sent to the defendant in Las Vegas, be charged off as bad debt (180); identified a check dated September 2, 1959, in the sum of $300.00 of which he had no recollection (180-181), the endorsement on the check payable to the defendant was made by PHILLIPS (182); that the check for $300.00 was reimbursement for a payment made to the defendant (182); that his recollection is that he told the bookkeeper to charge the $300.00 check off to bad debts (185); that on August 18, 1961, a check for $300.00 payable to PHILLIPS was for a loan he made to JACK SULLIVAN on July 31, 1961 (185); that at the time Exhibits 22 through 24, were made, the witness thought they were loans (186); that he collected

$50.00 or $100.00 from the defendant (186); that he gave the defendant sums of money other than Exhibits 22, 23 and 24, of a different nature (187), Exhibit 17 is the witnesses' personal checks (189); that the explanation for giving the personal checks to defendants was: "I didn't want to be involved with the business any further. I thought I could well afford it; that I would give him these checks and not go through the business books anymore through the business. I was not sole owner of the business and I didn't want to get involved. My employees were profit sharing. I decided that I would handle this thing differently and do it on my own." (190); that the purpose of the money given to the defendant was for loans (190); that there were no notes given; no due dates when the loans were to be repaid (190); no interest on any of the loans (191); that he might also have given defendant some cash in 1960 (191).

In response to questions regarding whether any type of percentage of his business with GOURMET RESTAURANT were paid to the defendant, testified, "Well, it would be based on what I felt the business might be worth, knowing that there were some small loans out and that he had paid back a couple of small payments from time to time, I would base it on just how well we got along (192); that there was no particular percentage criteria discussed." (192). That in the years 1961, 1962 and 1963, in addition to the checks given to the defendant, he gave defendant cash (194). There was no set period as to how often defendant was given money (194); that he does not remember whether any payments to the defendant were made by check or by cash (194); that in the years 1962 and

1963 gave several small payments to the defendant, possibly once a month or every couple of months (194); that checks from his personal account had no connection with PHILLIPS POULTRY and were personal payments for loans (195); that he gave the defendant money in the hopes that he would continue to get the business of the defendant and in hopes that he would get some of it back from time to time (196); that he received no money back from the defendant on any of the checks, Exhibits 23 through 25 (197); that he mailed Exhibits 17 through 20 to the defendant (198); that defendant did not ask for the amounts shown on the checks in Exhibits 17 through 20, but that PHILLIPS would decide the amount; that several times defendant might have asked for some certain amount of money for a loan he had to pay or for a bank payment or for whatever it might be, but that the decision as to the amount of money he was going to give was decided by the witness PHILLIPS (198); that the GOURMET RESTAURANT is a valuable account to the witness (199) [Court then adjourned for the day (200)].

On June 7, 1967, pursuant to permission to reopen, PHILLIPS was recalled by the prosecution, as follows (204): "I would like to ask you if you would care to change your testimony in regard to the nature of those payments to the defendant." (205). Defendant objected to the foundation for changing of testimony as follows: "I am going to object to this with respect to changing the testimony. I think that unless you can show a foundation for material change, the circumstances from the time the witness was on the stand yesterday afternoon until this morning, that I would object to

the procedure." The Court overruled the objection, stating, "I think we want to know what the facts are. Of course, you can comment on it and you may interrogate him on cross-examination . . . if his testimony yesterday was in error, we ought to find out what the truth is." (205).

> "Q. Mr. Phillips, yesterday, in regard to Exhibits 17 through 20 you testified that those payments were loans. You wish to change that testimony?
>
> "A. They were given in appreciation for routine of the business. They were not considered too much of a loan." (206).
>
> "Q. In consideration of what business?
>
> "A. The business we were doing with the restaurant.
>
> "Q. Was the defendant doing the buying from you for the Gourmet?
>
> "A. Yes, ma"m, he was.
>
> "Q. So the checks, Exhibits 18 through 20, are in appreciation to the defendant.
>
> "A. Yes.
>
> "Q. They are not loans?
>
> "A. Well, no." (207).

In cross-examination, PHILLIPS testified that nothing happened between the time of his leaving the stand in the afternoon of June 6, and the morning of June 7 (207). That afternoon he

talked to the defendant; talked to MRS. DUNNE (the prosecutor); that he talked with FOLEY and CALKINS, but not in relation to business; that he was in MRS. DUNNE's office after leaving the stand on June 6 (208), was there for five minutes (209); that the Government officials and representatives did not offer any reward or immunity or anything in way of any value or consideration in exchange for his changing of his testimony; that nothing was said except, "to tell the truth" in MRS. DUNNE's office (209); that he told the truth both on June 6 and on June 7 (210); that defendant asked him for a loan of money and that he loaned the defendant money; expected to get paid back; that he did not give the small payments back to defendant (210-211); that the first transaction between the defendant and the witness was asked for by the defendant (211); that he expected to get paid back for that (212); did not intend to give it to him as a gift; and after the third or fourth check given to the defendant, the witness gave no further thought of whether he was going to get the money back (212); that he gave the defendant between three and five thousand dollars (213); that he received about $150.00 to $250.00 back from the defendant (213); that he received $100.00 on account at Churchill Downs (214); that "after the case was involved here, the defendant wanted to give him back some money", and he refused the payment since the case was under investigation (215); that the money wired to the defendant in Las Vegas was to be considered a Christmas gift (215); that the defendant never mentioned the condition of doing business for the sums of money (216); that on Exhibit 23, a check for $300.00 (217) there

is an endorsement of JACK SULLIVAN and HARRY PHILLIPS (218); that defendant did not place his endorsement thereon, but that the witness did; that defendant did not authorize him to place his name on said check as an endorsement, but that defendant had the money prior to the issuance to that check (218); that the computation of the amounts sent to the defendant in Exhibits 17 through 20 were by his own judgment; that there was no definite percentage which he paid over (219); that he gets between 2-1/2 to 3 percent net profit in a good year (225); that the defendant still owes him money (227); and he doesn't know how much the defendant still owes (227).

PHILLIPS testified on re-direct examination, "Those personal checks in appreciation of our business, they are still open." (227). Further, "But I don't think that they are loans anymore, I think they are appreciation for the business we were doing with that company." (228).

On re-cross examination, PHILLIPS explained, " 'appreciation of business" as "We did not have to pay alot of salesmen or never have paid any commissions. These were given in appreciation because we had no salesmen," and "were not asked for by the defendant, but got to be routine." (228).

SHERWIN J. GERBER testified on behalf of the government that he is a Certified Public Accountant for COAST POULTRY for the years 1957 through 1964 (230); identified certain books and records of COAST POULTRY, Exhibits 29, 30 and 31 in evidence (232); that Exhibits 26 and 27, COAST POULTRY COMPANY's checks are not posted to the notes and loans receivable accounts

in Exhibit 30 (239); that Exhibit 27 contains four items, two of which are charged to purchases and two of which are charged to commissions and are so reflected in the books and are not posted to loans receivable account in Exhibit 30 (240); that GERBER had no recollection of any discussion of items in Exhibit 27 with the deceased GEORGE CINQUINI, owner of COAST POULTRY COMPANY (241); that the notes receivable ledger indicates on April 12, 1960, a loan being made to JACK SULLIVAN in the sum of $1500.00, on October 20, 1960, shows a loan being made to SULLIVAN in the sum of $1,000.00; March 27, 1961, a loan of $500.00 to SULLIVAN; August 14, 1961, a loan of $400.00 was to the defendant (242-243); May, 1962, a loan to SULLIVAN in the sum of $500.00. Referring to defendant's Exhibit B, shows a $200.00 check paid to COAST POULTRY (244) and deposited in the California Bank, account of COAST POULTRY, in January of 1964, and that COAST POULTRY had an account at the California Bank at said time (244); that the credit of $200.00 appears on the loan receivable ledger as a credit (244); that there are no general journal entries relating to the defendant in 1963 (247); that he had no knowledge of any financial transaction involving COAST POULTRY that was not recorded on the books (248).

MYRON CURZON, an attorney for GEORGE CINQUINI, owner of COAST POULTRY (250), was called by and testified for the Government that he took custody of the books and records of GEORGE CINQUINI and COAST POULTRY when MR. CINQUINI became terminally ill (250-251). Referring to Exhibit 31, he

stated that he had questioned the defendant regarding the said notes and defendant acknowledged that the notes were due, but that he had paid to CINQUINI the sum of $500.00 in cash (253); that he and the defendant made arrangements for installment payments on the notes (254); that he received payments over a period of years (255); that defendant made no statements whether any other monies were owed to COAST POULTRY (255), and at the time of trial, the estate of GEORGE CINQUINI has been paid the total face amount of all of the notes, Exhibit 31, without interest (257); that he did not give the defendant credit against the face amount of the notes for the $200.00 check dated January 19, 1964, defendants B and C (258).

SHERWIN GERBER was recalled and testified that the notes, Exhibit 31, total sum of $3900.00 and reflected in the notes and loan receivable accounts are not Exhibits 26 and 27. On recross testified that the $200.00 credit of January 19, 1964, was applied to the notes and that the balance after such application was $3,700.00 (261).

BEATRICE EBELING was called on behalf of the Government and testified that she is a bookkeeper employed by RATNER BROS. MEAT COMPANY and Secretary of the corporation (263); identified Exhibit 27, are two checks for $100.00 and $150.00 posted in Exhibit 38 which is the disbursements records and summarized in Exhibit 34 and that they are charged to Account 510 (266), which account is labeled Food, Consultant and Fee Account (267).

Defendant objected to the testimony on grounds of

immateriality and irrelevancy as to the particular account to which RATNER BROS. MEAT COMPANY charged the subject check and that the same were not binding on the defendant, to which the Court generally agreed (268-9). However, the Court ruled that the evidence may have some value in throwing light upon the entire transaction and maybe some evidence as to his intention (269), and the objection was overruled. The Court then instructed the jury that whatever election MR. RATNER may have made as to how to charge the checks were not binding on the defendant, but was allowing the evidence in to show light on the entire transaction and upon the intent of the defendant in receiving them (272). MRS. EBELING further testified that the payments then go to the chef, who was the named payee in the account, and in this particular case, went to the defendant (273).

ROBERT W. JOYCE was produced as a witness and testified on behalf of the Government that he was president of SOUTHERN CALIFORNIA TRADING, which was engaged in importing and exporting and brokering of seafood products (276-7). Witness identified Exhibit 55, a check dated March 5, 1963, for $225.00 drawn on SOUTHERN CALIFORNIA TRADING COMPANY, payable to defendant (280); that the $225.00 was given to the defendant as a commission (281); identified a memorandum, Exhibit 52, and that it was prepared and bore the reason why the check was issued to the defendant, that there was no agreement, nor did he get any money back for that check (282); that SOUTHERN CALIFORNIA TRADING did loan the defendant $1000.00 on August 27, 1963, and

a loan was made and a note was received (286); identified a check disbursement record, Exhibit 70 of SOUTHERN CALIFORNIA TRADING; that the account charged was notes receivable, which is crossed out in pencil to an account called "Sales Disct." that SOUTHERN CALIFORNIA TRADING did not have an account called "Sales Disct." (295); that Government's Exhibit 70, the original entry is in carbon (296), the strike-over in the word Sales "Disct." is in pencil;at the time he left SOUTHERN CALIFORNIA TRADING in November, 1963, there was no account called "Sales Disct." (297); that when the money was loaned to SULLIVAN, the note ended up in the files of the corporation (297); that he knew of no demand from SULLIVAN for the $225.00 for services (298); that the initiation for the writing of the check was from MR. JOHNSON (298).

MORRIS RATNER called as a witness by the Court, testified that he is the owner of RATNER BROS., meat and provision company of Santa Monica (305); engaged in the business of wholesale meat and sold to the Gourmet Restaurant in the years of 1960 through 1963 (305); that his relationship with the defendant has been social (307), and not primarily business; identified Exhibits 38 through 44 (309); testified that Exhibit 32 the two checks totaling $250.00, were for tickets to a chef's convention in Anaheim, and he issued those checks for the purchase of tickets from the defendant (311).

With respect to Exhibits 38 through 44, involving 52 checks, totaling over $12,000.00, that he gave them to the defendant for loans made to JACK SULLIVAN (312) and that for each check given he was asked for loans (313); that he lent the money to him at various

places after being asked for it by the defendant (315); that there was no interest demanded by him of the defendant on the loans, nor did the parties discuss interest; that the defendant still owes him approximately $500.00 to $700.00; that he did not keep a record of how much the defendant owed him at any certain time (318). Payments were made by the defendant in cash to RATNER at sporadic intervals; that it could have happened that he had several loans outstanding before he received the payment on even one (321); that at any given time he did not know exactly how much defendant owed him (321); that he knew he was paid back but he can't swear to when he was paid back (323).

KATHRYN MOWAT identified Exhibits 49, 50, 51, 52, 53, 55 and 56, as business records of DOUGLAS BROS. for the years 1960, 1961, 1962 and 1963 (325).

ALBERT R. HAZEN was produced and testified for the government that he is a public accountant and audited the books and records and prepared the tax returns of DOUGLAS BROS. PRODUCE (327); and has done so for thirteen years. He audits the books every month; identified a write-off to bad debts to $1400.00 owed by the defendant to bad debts. As a result of owners' instructions, charged off loans to bad debts (330); that he charged off $3200.00 pursuant to instructions, crediting advances and loans and charging commissions, said $3200.00 being owed by the defendant (332); that the commission accounts as used by the DOUGLAS BROS. was for commissions paid to individuals for obtaining business for them (332).

The defendant moved to strike all of the testimony of witness HAZEN on the grounds of immateriality, since all of the testimony related to occurrences happening prior to the indictment. The Government explained that a pattern of a loan, later being charged to commissions, was shown and the evidence will show that the checks charged to sales promotion show a pattern of first starting as a loan and then a change, and the Court ruled that the motion to strike was denied (339-340).

HAROLD HOLMAN called on behalf of the Government and testified that he is an office manager, account manager and bookkeeper (343); that he did not work full time in keeping the books of ROYAL PRIME STEET (344). HOLMAN worked as bookkeeper full time for ALL AMERICAN. ROYAL PRIME STEER was a subsidiary of ALL AMERICAN. HOLMAN testified that he was acquainted with DEAN FLANAGAN; that he gave FLANAGAN periodically sums of cash (360); that the sums of cash had no relationship with purchases by the GOURMET RESTAURANT (360); that he gave these sums of cash to FLANAGAN weekly and sometimes two weeks at a time (360); that when FLANAGAN came to the office, he picked up the sales to the Gourmet Restaurant and gave him three percent of the sales in round figures in cash (361). It went on at least three years starting about the end of 1959.

In cross-examination, testified FLANAGAN was the general manager in 1959 at PRIME STEER. He was on a salary and a bonus arrangement, which was based on the profits of the company; that the plan of three percent of sales to GOURMET RESTAURANT

to be paid to FLANAGAN was set up by BLAINE HUTCHINSON; that there was no particular reason why the sums were paid in cash to FLANAGAN, but he was never paid by check nor any reason why he was not paid by check and the sums of each particular payment were for around $150.00 and $200.00 (366); that FLANAGAN received a bonus over the year's sales and in a lump sum and was paid by check (367).

DEAN AUTHUR FLANAGAN called on behalf of the Government and testified that he was employed by ROYAL PRIME STEER as a salesman, sales manager and general manager (368-9) and became general manager in 1962; became president of the corporation in 1962; that he now has a majority interest in ROYAL PRIME STEET (370); that he now has in his custody and control books and records of ROYAL PRIME STEER (371). Exhibit 57 were the sales records to GOURMET RESTAURANT; that he became acquainted with the defendant around 1958 or 1959 (373); that his association was business (373); that he had the following conversation with the defendant:

> "A. That in lieu of the restaurant and the prestige that we had there, the press and necessity of the sales person to call on the account would not be required that this could be used as an advertising allowance to be passed on to the gentlemen.
>
> "Q. Well, who said this, 'in lieu of salesmen' and all of this about advertising?
>
> "A. Mr. Sullivan.

"Q. He made those statements to you?

"A. (Witness nods.)

"Q. Was there any statements made in regard to what was the salesmen's commission that he is talking about or the salesmen's or middleman?

"A. Yes, it was three per cent.

"Q. Was that actually discussed?

"A. Yes.

"Q. Now what, if anything, did you tell him?

"A. That I would take it up with the people at my corporation and give him an answer.

"Q. Did you in fact take it up with the people of your Corporation?

"A. Yes, I did.

"Q. Is this Mr. Baine Hutchinson? (375)

"A. Yes.

"Q. Mr. Hutchinson?

"A. Yes, ma'm.

"Q. Did you in fact subsequently give the defendant an answer?

"A. Yes. After being told that the restaurant warranted it from the advertising basis because of the size of it and this sort of thing, that it would be all right. I told him yes, it could, it would be." (376).

There were payments made to the defendant beginning the

end of 1959 (377); made on close to a monthly basis, in cash and that he made the payments directly to SULLIVAN (377) at the restaurant, in the lot or some place in the restaurant or around the restaurant; that he received the money to pay over to SULLIVAN from the general office of ALL AMERICAN (378); got the cash from MR. HOLMAN (378). Sales were tallied up and computed for the previous period to the GOURMET RESTAURANT, took a three percent figure and paid this over to SULLIVAN (378), and made the payments approximately once a month starting the end of 1959 until 1963 (378-9). In 1963 FLANAGAN made the payments by himself by declaring himself a bonus; paid approximately $2100.00 to SULLIVAN in 1963 (380); paid the $2100.00 over a twelve months period in cash (381). Payments were made in the parking lot at Disneyland; that the payments were first made directly by the witness who then declared himself a bonus and reimbursed himself (381). The payments in 1963 were not loans (382). The payments given to the defendant were:

"For the same thing, for advertising allowance or extension of the advertising allowances as they were previous to this time." Stopped paying in 1964 (382). The witness handled the Disneyland Gourmet account by himself all along (385); that he did not know the defendant until he solicited the account (385); that FLANAGAN personally did not loan the defendant any money between 1956 and 1959; that between 1956 and 1959 PRIME STEER loaned SULLIVAN money (389); that he does not know whether PRIME STEER was ever repaid (390). Between 1959 through 1963 he has no

recollection whether PRIME STEER loaned defendant any money (399); that between 1958 through 1963, he personally did not loan SULLIVAN any money (390); that he gave $2100.00 to defendant in the twelve months period in 1963 (394). Exhibit 60 represents reimbursement to himself for the $2100.00 (394); that the payments terminated because he did not like the practice and didn't want to do it anymore (403).

DANIEL FOLEY of the Internal Revenue Service was called as a witness and testified for the Government (420); that MYRON CURZON turned over records of COAST POULTRY pursuant to subpoena to the Government, but that Mr. Curzon did not turn over any records concerning cash disbursements or receipts for 1962 or check stubs or entries on check stubs for 1962 and 1963 (420); that he prepared Exhibit 28 (421) from information from the cancelled checks and available check stubs of COAST POULTRY on or about July 7, 1964 (421); that Exhibit 28 is a resume from the check stubs of COAST POULTRY (422).

On cross-examination FOLEY testified as to other information on the check stubs other than that which was in his recap Exhibit 28 (434-435), and on eight of the checks where the payee was shown to be the defendant, on the stub themselves, notation show charges to be to drawing, travel and entertainment (436); that the drawing account was the proprietorship account of GEORGE CINQUINI, owner of COAST POULTRY (436) and the other expense accounts such as travel and entertainment are appropriate charges to business (437); that there are charges to the purchases account for checks

payable to the defendant; and there are charges to commissions without endorsements on the checks with a notation "C A W" believed to be the parent corporation of GOURMET RESTAURANT (440) and charges to the commission account in the sum of $311.00 for which there is no endorsement and charged to commissions C A W with a notation "Beverly W." (440); that the checks for $311.00 and $159.00 charged to commissions are not endorsed by C A W or defendant, and the checks are payable to cash (442).

FORREST B. CALKINS was produced as a witness and testified on behalf of the Government; and it was stipulated that the witness was qualified to testify as an expert technical advisor and accountant (445); that he prepared Exhibit 72, consisting of four pages (446) and prepared computations thereon (446). The computations was based on the testimony of the witnesses and exhibits offered (447); that for the year 1960 computed $7,111.94 (450) as follows: PHILLIPS POULTRY COMPANY $575.00; RATNER BROS. MEAT COMPANY $2,650.00; DOUGLAS BROS. $2,700.00; ROYAL PRIME STEER $1,186.94 and a net adjustment $7,107.90 (452); that the tax liability for the year 1962 as corrected is computed by the witness shows a tax liability of $2,707.22 (452). For the year 1961 shows additional income of $7,630.78 from PHILLIPS POULTRY COMPANY $500.00; RATNER BROS. MEAT $1900.00; DOUGLAS BROS. $3800.00; PRIME STEER $1430.78 and a net increase in taxable income of $7310.56 and a computed tax liability of an additional $2883.05 (456). As for the year 1962, additional income of $8,050.11 (457); PHILLIPS POULTRY $150.00; COAST POULTRY

$978.00; RATNER BROS. $2200.00; DOUGLAS BROS. $2675.00 and from ROYAL PRIME STEER $2047.11, and the computed additional tax was $3,082.38 (458). As for the year 1963, additional purported income of $6,398.14 (460) as follows: PHILLIPS POULTRY $556.00; COAST POULTRY $549.50; RATNER BROS. $2500.00; SOUTHERN CALIFORNIA TRADING $225.00; DOUGLAS BROS. $200.00; ROYAL PRIME STEER $2367.64, total of $6,398.14 showing an additional tax liability of $2415.53 (461).

On cross-examination MR. CALKINS testified that the testimony of Mr. Ratner was that all of the money paid over to the defendant were loans (471).

(Defendant's Case)

NICK DOUGLAS was called by the defendant, and after identifying himself, as in the business of the wholesale produce business, as DOUGLAS BROS. PRODUCE COMPANY (499-500); refused, thereafter, to answer further questions respecting any financial accommodations given to the defendant on grounds of self-incrimination.

ALBERT WOLLMAN identified himself as Manager of DAIRY FRESH PRODUCTS (510), involved in the sale of dairy products and knows the defendant (511). He testified that the Gourmet Restaurant purchased items from his company (511). Thereafter, the Government objected to questions regarding the following testimony:

(1) That he loaned money to the defendant; had been paid back; has never been asked for commission or a kick-back; that this evidence was offered to show that the pattern alleged by the Government was refuted by this testimony (512), and was also in the nature of impeaching testimony relating to payments of 3 percent of business (513-517), and the Court ruled that the testimony was incompetent (517).

LOUIS JOHNSON testified that he worked for SOUTHERN CALIFORNIA TRADING CO. in 1963 (520). That in regard to the $225.00 paid by SOUTHERN CALIFORNIA TRADING CO., testified that he gave it to the defendant with no strings attached and was not asked for the money (526).

JACK WILANTT called by the defendant and testified he was in the wholesale meat business for approximately 30 years at OMAHA MEAT COMPANY (533), as General Manager (534); that in the meat business of OMAHA MEAT COMPANY, they have a net profit of approximately 1 to 1-1/2 percent (537); that he had never heard of any purveyors paying 3 percent of sales as a sales inducement or as a kick-back commission and that OMAHA MEAT COMPANY does not pay chefs 3 percent as commissions to salesmen plus car and minor expenses (547), which is used as a measurement so that 3 percent of sales as against $125.00 minimum guarantee.

The defendant, JOHN L. SULLIVAN, was called and testified relating to business he did with PHILLIPS POULTRY (550); that he paid Phillips back for monies owed (552); denied ever asking Phillips for 3 percent of the sales to Gourmet Restaurant in order

to do business (555); that Phillips excused the payment of the money wired to him in Las Vegas to be treated as a Christmas present (556); that the endorsement on Exhibit 23, a check for $300.00, dated September 2, 1959, was not his signature; that he did not recall getting said money (557). Exhibit 24, a check payable to HARRY PHILLIPS POULTRY CO. remained the same, and even on the morning of his testimony, he is still ordering from Phillips (558). That with respect to all of the financial transactions he has had with Phillips, other than the money wired to Las Vegas, Phillips never stated that he was not looking for reimbursement and never pressed him for payments, and when the defendant repaid Phillips money, Phillips never refused to take it (560); that he still owes Phillips $900.00 (561). He explained about the loans made with COAST POULTRY, accumulations of monies advanced from time to time (564); that after Mr. Cinquini's death, he arranged with Mr. Curzon to pay COAST POULTRY back at the rate of $200.00 per month (567), and repaid a total of approximately $3900.00; that Cinquini had a system of charging him interest in advance (570); that he never asked COAST POULTRY for a percentage of sales to do business with him (572); that he received nothing other than a Christmas present of $100.00 for doing business with Cinquini (572), which was received in cash (573).

Did not remember the $225.00 check received from SOUTHERN CALIFORNIA TRADING COMPANY and acknowledged that the subject check, Exhibit 45, bears his signature (573).

That he knows all of the DOUGLAS BROS. (579), and has

known them for approximately 14 years, and purchased produce from them (580); that he received financial help from them, which were mostly repaid by cash (581); was never an employee of DOUGLAS BROS.; that he received no commissions from DOUGLAS BROS. for performing any services nor was the subject discussed (582-583); identified the endorsement of NICK DOUGLAS on a check, defendant's Exhibit F, in repayment (583); that he does not owe DOUGLAS BROS. any further money (584), the final payment having been made in May, 1966, by check (585); that he continues to do business with DOUGLAS BROS., and will continue to do so (585).

That he knew MORRIS RATNER; had private financial transactions with MORRIS RATNER (587); that Ratner would loan him money by giving him personal checks (587-588); that initially, he was supposed to repay a previous loan before he could get a second loan from RATNER (588); that on one occasion, he borrowed $1000.00 from the Bank of America, co-signed by MORRIS RATNER and gave the proceeds to RATNER in payment of loans made from RATNER (588-9); that he repaid RATNER at various places (591), and his current standing with RATNER was that RATNER contended that he owed $400.00 (592); that the reason for the repayment in cash is that in the beginning he was repaid by checks, which on several occasions had bounced (596).

That he knows DEAN AUTHUR FLANAGAN (597); that his initial contact was after FLANAGAN had been doing business with GOURMET (597); that he was required to buy meats from ROYAL PRIME STEER (599); that in 1958 or 1959, he borrowed $500.00

from ROYAL PRIME STEER through FLANAGAN (602), and identified a check given to ROYAL PRIME STEER in repayment, which bore ROYAL PRIME STEER's endorsement (603); that he had financial transactions with FLANAGAN (605), in the sum of $200.00 or $300.00, which he would pay back in two or three weeks and that the years 1960 to 1963, he borrowed approximately $800.00 to $1000.00 per year, and paid back the previous loans before he borrowed the next one, and he always paid in cash since this was required by FLANAGAN (605). That there was never an arrangement between he and FLANAGAN whereby FLANAGAN was to pay 3 percent of sales to GOURMET to the defendant (611); that FLANAGAN did not pay 3 percent of sales made to GOURMET RESTAURANT to the defendant in any month (612); that he never solicited a commission as a condition of doing business of 3 percent of sales to GOURMET RESTAURANT from FLANAGAN (612).

That PHILLIPS never sent him a Form W2 or a Form 1099 (612-613). SOUTHERN CALIFORNIA TRADING never sent either of those forms (613), nor did RATNER, DOUGLAS BROS. OR FLANAGAN (613-614); that as of June 9, 1967, he does not owe FLANAGAN any money; that he continued to do business with FLANAGAN in 1965 (617), and the GOURMET RESTAURANT stopped doing business with FLANAGAN around Christmas of 1965 (681); that the defendant filed Bankruptcy, Exhibit 41, since a Mrs. Provatas got a judgment against him for an accident in the sum of $5717.67; she is listed as a creditor along with other creditors on the bankruptcy petition (624); that his driver's license was

suspended as a result of that accident (626); that he borrowed a car from DOUGLAS BROS. for over a year; that all of his creditors were repaid even though he filed bankruptcy, other than Mrs. Provatas (627-628).

On cross-examination, admitted taking depreciation for the year 1962, 1963 and 1964, on the car owned by CHRIS DOUGLAS (635-638); that the defendant knows that it is unlawful to give kick-backs or rebates for person selling meat or poultry (639); confirmed that he began borrowing from FLANAGAN in 1959 (643), off and on through 1963; that he could not tell how much he borrowed since this was irregular, paid all of those borrowing back; had to repay the first loan before he could get the second loan; denied borrowing a total of $1300.00 from ROYAL PRIME STEER (646); he had two bank accounts in 1960 through 1963, one at the Bank of America and one at the Security First National Bank in Anaheim (648), but he did not have them both at the same time (648). He does not have any recollection of the check in the sum of $225.00 from SOUTHERN CALIFORNIA TRADING (648), which check is marked "cashed" at the Bank of America (649). Beginning in 1960, he owed a total of $5,000.00 to COAST POULTRY (652); that Cinquini or Coast Poultry always charged interest from 8 to 10 percent (653); that approximately a year prior to June of 1964, Cinquini brought him six notes, dated on separate dates, which he executed on the same day (655); that he began repaying on the $5000.00 sum about six months before Cinquini died (657). Paid one check of $200.00, the rest was in cash, and a Promissory Note was returned to him which he tore up (657).

Five notes, defendant's Exhibits C to H, were part of the six notes originally signed (658-659). He signed them even though some detailed information contained on them were incorrect (651). He borrowed $1000.00 from SOUTHERN CALIFORNIA TRADING; that he did not pay interest thereon nor was it discussed (653); that the interest rate of 6-1/2 percent and the one year due date was not correct on the SOUTHERN CALIFORNIA TRADING note wherein he agreed to and did repay it in four months (664). He was borrowing from the DOUGLAS BROS. from 1956 on (676); that he would borrow $500.00 and then would not borrow again for about four months, but in the interim, he paid the $500.00 previously borrowed, payments were spasmodic depending on whether he had the money (676). That after several bad check experiences, the DOUGLAS BROS. requested that he pay in cash (678), which was before DOUGLAS BROS. were audited by the Government (679). He completely repaid DOUGLAS BROS. in 1966 (683); related the transactions had with loans made from RATNER (683); that he received them on or about the date they bore and normally repaid the first check before receiving the next check (687) and repaid by cash (688), since he had bounced some checks on RATNER (685).

With respect to PHILLIPS, he rarely borrowed money from 1957 to 1960, but whatever he borrowed, he repaid (690); that he owed PHILLIPS $900.00 at the time he was being investigated when PHILLIPS told him, "I can't lend you anymore money because I understand you are being investigated and they have been over to talk to me." "I can't loan you anymore money and you better repay what

you owe me." That his payments to PHILLIPS were also cash, but that PHILLIPS did not request that he pay in cash (693); that from the purveyors in question, namely, PHILLIPS, FLANAGAN, RATNER, JOYCE, COAST POULTRY and DOUGLAS BROS., that payments received were from 1960 through 1963, were received in person except that HARRY PHILLIPS mailed checks to him because he had glaucoma and couldn't drive; that he had no agreements with any of the suppliers as to how frequently he was to receive money (693); that he made purchases from all the suppliers in the years 1960 to 1963; that he kept no records of any type regarding the sums of money he was receiving and did not even keep records at the bank (694); that he may have made notations on a calling card as to what he owed people (694). That he always knew what he owed the six suppliers (695); that he never received sums of money at the time he placed orders with the suppliers (695). Denied receiving a percentage from ROYAL PRIME STEER or DEAN FLANAGAN in the years 1960 through 1963 (722). Denied receiving 30 cents for a case of eggs and 3 percent of the remainder of business done with PHILLIPS POULTRY with GOURMET RESTAURANT. Had no percentage arrangements with any of these people for money relating to the gross of the business being given them (723) or with COAST POULTRY. That he did not receive from COAST POULTRY 5 percent of the month's gross business for orders given to GOURMET RESTAURANT (726).

On redirect examination, identified defendant's Exhibit O as proceeds turned over to FLANAGAN in repayment of a loan made

to him when the said exhibit has a notation "DF" (728); explained why he took the car depreciation (731) in that he did not know that he could not take depreciation unless he owned the car (732). After looking at Exhibit 76, which affects COAST POULTRY, stated that he could not truthfully identify whether the endorsements thereon were his although they looked like his own, but there are almost misspellings of his name (737). That he hired an attorney named JOSEPH FAIRFELD to handle his bankruptcy matter (740); that said attorney did not go down each item on the schedule as he was preparing the schedule (740); that defendant does not know whether all the information he gave to the attorney was reported on the schedule (741); that he did not read question No. 9 before he gave Mr. Fairfeld his answer nor was he ever asked the substance of question No. 9 (741); explained that he signed seven sets in a hurry and was advised to sign in a hurry (742).

VELMER EUGENE HOOPER was called as a witness (251). His occupation is a meat man, he knows DEAN FLANAGAN's reputation in business circles for truth, honesty and veracity, and the reputation for truth, honesty and veracity of FLANAGAN is bad (753).

JOE ALLEN BARNES was called to testify on behalf of the defendant (755). He is a chef at the IRVINE COAST COUNTRY CLUB, knows DEAN ARTHUR FLANAGAN, knows FLANAGAN's reputation for truth, honesty and veracity in business circles (756); that FLANAGAN's reputation for truth, honesty and veracity in business circles is bad (756); that knowing FLANAGAN's reputation, he would not believe him under oath nor would he believe him under any circumstances (758).

FORREST P. CALKINS previously qualified as an expert was examined by defendant and explained that an I. R. S. Form W2 is a form given to employees by the employers showing employee's wages paid for the calendar or taxable year and that the employer is required to, by law, give this to the employee (760-761); that a Form 1099 is an information form indicating that a person or business paid monies of a taxable nature over to a third party taxpayer, such as interest, dividends, commissions, rents where there is no withholding taken from the source and that the payor is required under the Internal Revenue Code to send it to the recipient (761).

V

ARGUMENT

A. DID THE COURT ERR IN FAILING TO RULE ON THE DEFENDANT'S MOTION UNDER RULE 29(a) AT THE CLOSE OF THE GOVERNMENT'S CASE?

Defendant moved for judgment of acquittal based on the lack of showing of wilfulness or specific intent and cited in support thereof the cases of Spies v. United States, 317 U.S. 492, and Holland v. United States, 348 U.S. 121, 139 (494-496). The Court stated, "the motion will stand submitted." (496). Counsel thereupon queried whether an objection should be made at said point inasmuch as the matter had been submitted and the Court replied, "not until I have ruled." (497).

There appears to be some conflict between the circuits as to mandatory applicability of Rule 29(a). In Jackson v. United States, 250 F.2d 897 (5th Cir. 1958), said Court held that the Court cannot reserve a ruling on a motion at the close of the government's case and reversed the lower Court.

In Cephus v. United States, 324 U.S. 893, District of Columbia Circuit, the Court stated on page 897,

> ". . . but Rule 29(a) of the Federal Rules of Criminal Procedure makes it clear that the first ruling is not discretionary in criminal cases. A judgment of acquittal is mandatory if the Government's case is insufficient. The trial judge has

> no discretion to reserve his ruling in the expectation that the defendant will testify (Jackson v. United States, 250 F.2d 897)."

In the concurring opinion, at page 898, Circuit Judge Wright states,

> "Pursuant to Rule 29(a), Federal Rules of Criminal Procedure, appellant moved for judgment of acquittal at the close of the Government's case. Instead of granting the motion, the trial judge made no ruling. Under Rule 29, he was required to rule. And in view of the insufficiency of the evidence then in the record, the motion should have been granted.
>
> "The fact that exculpatory evidence offered by his co-defendant implicated appellant in the crime cannot deprive appellant of its right under Rule 29(a) nor can appellant's effort in introducing evidence on his own behalf to offset his co-defendant's evidence trigger the invocation of the waiver doctrine. Whatever continued validity that archaic doctrine may have, it certainly has no application to the facts of this case. Indeed a simple ruling of Rule 29(a) indicates that the waiver doctrine is without validity in any case. Defendant cannot be boxed out of his Rule 29(a) rights by forcing him to go to trial with a co-defendant or by waiting hopefully for him to convict himself."

In footnotes to the concurring opinion, at page 898, the Court states,

> "The grant of the motion in proper cases is mandatory and not a matter of discretion, for the rule states in terms that the Court, '<u>shall</u>' order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction. Rule 29(a) (Emphasis supplied.) See <u>Cooper v. United States</u>, 94 U.S. App. DC 343, 218 F.2d 39, 1954. The introduction of evidence after denial of the motion does not 'waive' the motion so as to prevent appellate review of the sufficiency of the evidence. <u>Hemphill v. United States</u>, 312 U.S. 657 (per curiam). If the denial of the motion was erroneous when made, it should be corrected on appeal. Few errors of law are as prejudicial to the defendant. Subsequent testimony cannot 'cure' the error. (See generally the comment: The Motion for Acquittal; A Neglected Safeguard 70 Yale L.J. 1151 [1961])."

But in the case of <u>Weathers v. United States</u> (9th Cir. 1963), 322 F.2d 566, 568, the Court states,

> "Assuming that it is error to reserve ruling on a motion for acquittal at the conclusion of the government's case, and assuming error was not

> waived by the introduction of evidence in the defense, such error cannot possibly be considered prejudicial unless the evidence was such that the Court should have granted the motion. . . . If it can be said that passing upon the foregoing direct and circumstantial evidence produced during the government's case in chief, reasonable minds could have found that the evidence excluded every reasonable hypothesis but that of guilt, then the Court should have denied the motion."

In Bolen v. United States, 303 F. 2d 870 at 874, the Court stated,

> "The rule for determining the sufficiency of circumstantial evidence on motions for acquittal were stated by this Court in Remmer v. United States, 1953, 9th Circuit, vacated 350 U. S. 377, 76 S. Ct. 425 on other grounds, as follows: 'The test to be applied on motion for judgment of acquittal . . . is not whether in the trial court's opinion the evidence fails to exclude every hypothesis but that of guilt, but whether as a matter of law reasonable minds as triers of the fact must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence . . . .

> If reasonable minds could find that the evidence excludes every reasonable hypothesis but that of guilt the question is one of fact and must be submitted to the jury.' " (Emphasis supplied).

But in the case of United States v. Rosengarten, 357 F. 2d 263 (2nd Cir. 1965), at page 266, the Court states,

> "It is settled law that the defendant who offers evidence after the denial of a motion for acquittal at the close of the Government's case in chief waives any claim as to sufficiency of that case considered alone. United States v. Calderon, 348 U.S. 160-164, Note 1. We have applied this rule when, as here, the judge ignored the command of Federal Rule of Criminal Procedure 29(a) and reserved decision on a motion (see United States v. Goldstein, 168 F. 2d 666, 669-70, 2nd Circuit 1948) and the Supreme Court's approving citation of the Goldstein decision in Calderon, supra, indicates that it perceives no basis for distinguishing between the two situations, at least in the absence of a demand for a ruling on the motion and explicate refusal by the judge to obey the mandate of the Rule."

Preliminarily, we note that defendant failed to demand a

ruling at the close of the government's case, but we submit that plain error exists here affecting substantial rights which this Court can recognize under Federal Rules of Criminal Procedure, 52(b).

In deciding whether the motion should have been granted, the evidence produced by the government must be competent and relevant. It must be tested under the rules of the Bolen and Remmer cases, cited above, which states that the test is not whether the evidence fails to exclude every hypothesis but that of guilt, but whether as a matter of law reasonable minds as trier of the facts must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence.

The government has produced evidence as follows:

(1) PHILLIPS first stated that he made loans to the defendant, later recanted and stated in substance, "that the payments were given in appreciation of business. They were not considered too much of a loan; that the defendant still owes him money, although he does not know how much; that they are still open; that he doesn't think they are loans anymore, he thinks they are appreciation for the business we were doing for that company and that the defendant never asked nor mentioned receipt of money as a condition of doing business."

(2) MORRIS RATNER'S testimony was that all of the monies given were loans.

(3) DOUGLAS BROS. PRODUCE CO.'s books showed preliminarily loans, and later charges in their books as Sales

Expense.

(4) The ROYAL PRIME STEER testimony relates to three percent solicited of sales as an "advertising allowance".

(5) The COAST POULTRY records indicate how the payor charged the payments but there is no showing of the reason for the payments over nor a solicitation by the defendant.

(6) The SOUTHERN CALIFORNIA TRADING COMPANY's sum of $225.00 was testified as being a gift by witness JOHNSON who actually caused the same to be drawn and delivered to the defendant.

Further, evidence that these payments were loans or gifts and non-taxable is shown by the fact that the government failed to produce a scintilla of evidence of wilfulness to indicate that defendant knew or should have known that he must report the same on his tax returns.

No evidence of specific intent to evade the tax, or the aspect of wilfulness can even be inferred from the government's case in chief. For instance, there is no showing of why Forms W-2 or Forms 1099 were not sent as required by law from the purveyors in question. No evidence was introduced that defendant knew by act, declaration or omission that the funds received were taxable income from any of the direct and circumstantial evidence introduced. No rebates or commissions or gratuities were asked for by defendant of any of the government's witnesses.

The government contends that W-2's and 1099 forms could not be sent since the purveyors would be acknowledging that they

were involved in illegal rebates.

It is to be noted further that the section relating to kickbacks as cited in the government's Trial Memorandum, to-wit, the Packers and Stock Yard's Act, Title 7, United States Code, Section 181, et seq. (CT 25-6), would not be applicable to vegetable products or seafood items. This eliminates the illegality aspect of the vegetable purveyor DOUGLAS BROS. and Seafood Broker SOUTHERN CALIFORNIA TRADING COMPANY. Based on the above test in the light of the state of the evidence of the government's witnesses as to its case in chief and testing the evidence against the rules set forth in Bolen v. United States, supra, in viewing the evidence in the light most favorable to the government including inferences to be drawn therefrom, it is submitted that there is no scintilla of evidence to show specific intent, wilfulness or knowledge of the necessity to report the monies received on the part of the defendant, independent of or from the testimony adduced that the payments were, in fact, anything other than gifts or loans. Indeed, the government has even failed to show that the monies received by the defendant are even income.

B. DID THE COURT ERR IN ALLOWING THE JURY TO SEPARATE AFTER IT BEGAN ITS DELIBERATIONS?

On June 13, 1967, at 4:45 P. M., after the jury had deliberated for approximately 2-1/2 hours, Court reconvened, the jury was admonished and was separated for the evening with directions

to return directly to the Jury Room the following morning at 9:30 A. M. and resume its deliberations (869).

Counsel were not beforehand advised by the Court that it intended to separate the jury nor asked for a stipulation to allow the jury to separate or invite any objections to its actions. Defendant asserts that due to the abrupt termination of the proceedings and the adjournment and the separation of the jury that the defendant was unable to place in the record an objection then or the following morning prior to the resumption of deliberations since the Court did not reconvene until 11:30 A. M. when it re-read further instructions on intent.

In the case of United States v. D'Antonio, 342 F. 2d 667 (7th Cir.), at page 669, the Court stated,

> "It is the right of the defendant when upon trial of a charge of the commission of the felony to have his case decided by a jury whose secret deliberations are not interrupted by the Court's order permitting them to separate before a verdict has been reached. Historically, this is a right recognized for many years. . . . "

At page 670, it further states,

> "At no time is it more essential that the jury should be immunized from outside influences then when it is engaged in deliberating upon what its verdict is to be. During that critical period, when the jurors are engaged in resolving vital

> issues between the government and the defendant, the judge certainly should not relax the traditional safeguards against outside intrusion. Disbursement into the city at night of a group of men and women who have been deliberating in the security of the Court House subjects them to the risk of being individually importuned, if not threatened, by telephone calls or personal contact."

Said Court reversed the trial court for permitting a separation over objection for permitting the jury to separate after beginning deliberations, and for failing to give precautionary instructions upon so doing, and in permitting the U. S. Marshal to communicate with the jury without defense counsel being advised.

In Cavness v. United States, 187 F. 2d 719 (9th Cir.), which is apparently the only Ninth Circuit case ruling on this point, at page 723, this Court stated,

> "Separation of the jury in such a way as to expose them to tampering or any improper influence after a criminal case has been submitted to them is reversible error (See Mattox v. United States, 146 U. S. 140, 149). 'Private Communications possibly prejudicial, between jurors and third persons are also error' (146 U. S. at page 150). But the error is not reversible if it appears that no prejudice in fact resulted. U. S. v. Reid, 53 U. S. 361, 366.

> Stone v. United States, 113 F. 2d 70, 77-78.
> Bilodeau v. U.S., 14 F. 2d 582, 586, Cert. denied, 273 U.S. 737. Unless as a matter of policy prejudice must be conclusively presumed, as whether irregularity 'has tainted the panel with sort of corruption or intimidation or coercion'. Klose v. United States, 49 F. 2d 177, 181, Cert. denied, 284 U.S. 626."

In the Cavness case, the error complained of resulted where a juror made a telephone call accompanied by a deputy marshal. During his separation, the jury at no time received any communication about the case from anyone, and both juror and marshal were presumed to have faithfully performed their official duty and the trial court found no prejudice to appellant warranting a new trial.

We distinguish the case of Cavness from the D'Antonio case, since in Cavness the juror was at all times accompanied by an officer of the court while making his telephone call. In the D'Antonio case the jurors were separated and allowed to go home or elsewhere unaccompanied by any officer of the court and for a period in excess of eight hours as in the case at bar.

The fact that no objection was raised, prior to the separation, or at the first opportunity thereafter, would normally not appear to be a waiver of the objection since it is asserted that such waiver must be an informed and knowing consent and should be

expressly waived rather than presumed.

In connection with the policy relating to prejudice, it is asserted that the risk of being importuned after having received all of the evidence of a particular case by any contact other than other jurors, could knowingly or unknowingly influence and motivate the juror, and said risk outweighs any other consideration and may be presumptively prejudicial.

In the light of the rules regarding impeaching of jury's verdicts by foreclosing the use of jurors' affidavits to impeach its own verdict, it is only fair that the presumption of prejudice to the defendant should attach, and the government should be required to show that no prejudice in fact accrued, rather than to cast such an onerous burden on the defendant.

As to whether the court did properly exercise its discretion in separating the jury in the absence of objection or express waiver with proper admonitions to the jurors, we submit that in the light of mass communication media, including radio, television and newspaper, the risk of direct and indirect contacts and the fact that the door is open to such contacts for even innocent reasons, such events are not taking place in a vacuum but within an interplay of personal and public contacts. It is asserted that the test should not be whether the discretion of the court was properly exercised, but whether the risk of exposure to the potential influence of any such contact by the jury could affect the juror's decision to the prejudice of either party.

C. DID THE COURT ERR IN FAILING TO GIVE THE COMPLETE "ALLEN INSTRUCTION" SO AS TO PREJUDICE DEFENDANT?

On June 13, 1967, at approximately 2:15 P. M., the instant case was given to the jury for its deliberations (868). About 4:50 P. M. on said date, the jury was allowed to separate until 9:30 A. M., June 14, 1967 (869). At approximately 11:30 A. M. on June 14, 1967, certain instructions on intent were repeated to the jury pursuant to their request (872-78). At approximately 2:45 P. M. on June 14, the Court, upon learning that the jury was having difficulty in reaching the verdict, gave most of the supplemental instruction from Mathis & Devitt, No. 15.16.

The alleged error, asserted here, is in the failure of the Court to give the following phrases from said instruction:

> "Remember too, if the evidence in the case fails to establish guilt beyond the reasonable doubt, the accused should have your unanimous verdict of 'not guilty'. Above all, keep constantly in mind that unless your final conscientious appraisal of the evidence in the case clearly requires it, the accused should never be exposed to the risk of having to run twice, the gauntlet of a criminal prosecution; and to endure a second time the mental, emotional and financial strain of a criminal trial. . . . You may be as leisurely in your

> deliberations as the occasion may require; and you shall take all the time which you may feel is necessary."

The subject instruction is the so-called "Allen Instruction" taken from Allen v. United States, 164 U.S. 492, 501. Within the Ninth Circuit, the instruction was given and approved in the case of United States v. Kawakita, 190 F.2d 506, affirmed 343 U.S. 717, and in Shea v. United States, 260 Fed. 807, 808-810.

In the case of Berger v. United States, 62 F.2d 438, where the Court reversed the trial court for inquiring as to the numerical division of the jury, at page 440, the Court stated,

> "We are further of the opinion that where a Court gives a supplemental charge of the character given in the instant case (even where it omits the inquiry as to how the jury stood numerically), it should again call the jury's attention to the presumption of innocence, the burden of proof, and the requirement that guilt must be established beyond a reasonable doubt; and it should state that it is the duty of each juror to perform his duty honestly and conscientiously according to the law and the evidence, and not to surrender his conscientious convictions. Such supplemental charges are calculated to wrongfully coerce the jury unless properly safeguarded. Stuart v. United States, 300 Fed. 769, 785. (An approved

> charge so safeguarded may be found in United States v. Allis, 73 Fed. 165)."

Here, we submit that the omitted portion of the supplemental instruction is the balancing factor in the instruction, in that it reminded the jury as to the government's burden of proof, and that the accused should not, unless required, be exposed to the risk of a second criminal prosecution or the mental, emotional and financial strain thereof, and that the deliberations of the jury may be as leisurely as the occasion may require. Such omission, we submit, causes an unbalancing and a one-sided version of the so-called Allen charge to the prejudice of the defendant.

In United States v. Smith, 353 F. 2d 166 at page 168, in the Fourth Circuit, the Court stated,

> "Almost as the outset the district judge stated, 'while undoubtedly the verdict of the jury should represent the opinion of each individual juror . . . '; he did not otherwise inform the jurors of their duty to dissent if dissent is founded upon reasons, conclusions, reasonably arrived at and reasonably held (U.S. v. Rodgers, 298 F. 2d 433, 436). It was not an adequate exposition of that ameliorating admonition which makes tolerable the charge upon the duty of individual jurors finding themselves in the minority to re-examine their views in the light of those of the majority and of

their paramount duty of agreement."

It is noted that under Rule 30, Federal Rules of Criminal Procedure, that an objection to the charge must be made at the time it was given. However, in the instant case, counsel were not apprised beforehand that the "Allen" charge or supplemental instruction would be given, and we are not here urging error on the part of the Court which in its discretion can and did give the charge. The basis of the asserted error is the fact that the Court omitted to give the entire charge. In view of the fact that the jury had been deliberating approximately ten hours over a 30 hour period at the time the supplemental instruction was given, and due to the apparent inability of the jury to agree, the failure to give the omitted portion of the instruction which can be construed to be favorable to the defendant, the scales were tipped in favor of the government and to the prejudice of the defendant.

We also assert that this type of asserted error is such plain error as would come within the ambit of Rule 52(b) of the Federal Rules of Criminal Procedure.

D. IS THE VERDICT CONTRARY TO THE WEIGHT OF EVIDENCE?

As set forth in Section A above (pages 34-41) hereto, defendant asserts that evidence of wilfulness is not supported by the evidence, either in the government's case in chief, or construing

the evidence as a whole.

> "A final element for conviction is wilfulness. The petitioner contends that wilfulness involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income. This is a fair statement of the rule."
>
> Holland v. United States, 348 U.S. 121, 139.

> "Wilfulness involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income. Holland v. United States, 348 U.S. at p. 139. The test of wilfulness is quite fully discussed in Spies v. United States, 317 U.S. 492, 499. Wilfulness involves a state of mind. Direct proof of wilfulness is seldom available. A consistent pattern of under reporting large amounts of income or over-claiming deductions and not recording such items on the taxpayer's records is evidence from which wilfulness may be inferred. (Holland v. U.S., 348 U.S. 121. Zacher v. U.S., 277 F.2d 219, 244. Canton v. U.S., 226 F.2d 313, 321) citing from Blackwall v. U.S., 244 F.2d 423, 429.
>
> "Direct proof of wilful intent is not necessary. It may be inferred from the acts of the parties and

such inference may arise from a combination of acts, although each act standing by itself may seem unimportant. It is a question of fact to be obtained from all the circumstances (citing cases)."

Battjes v. United States, 172 F.2d 1, 5.

"Affirmative wilful attempt may be inferred from . . . , any conduct, the likely affect of which would be to mislead or to conceal."

Spies v. United States, 137 U.S. 499.

"Appellant argues in his reply brief that even if there was sufficient evidence to show a tax deficiency, there was no evidence of fraud. A state of mind can seldom be proved by direct evidence, but must be inferred from all the circumstances. A wilful intent to evade income taxes may be inferred from such factors as appellant's failure to include a substantial amount of income on his and his wife's tax returns, the failure to keep adequate books which would clearly reflect income, and the concealment of the ownership of property, such as the safe-deposit box, real estate interests and business licenses. These factors, all present in the instant case, are but part of a general pattern of conduct engaged in by the

appellant from which the jury could infer the requisite intent."

(See Norwitt v. United States, 195 F.2d 127, 132.)

Remmer v. United States, 205 F.2d 277, 288.

"It is now settled that, 'wilfully' as used in this offense means more than intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual bona fide misconception of the law, such as would negative knowledge of the existence of the obligation, would, if believed by the jury, justify a verdict for the defendant."

Wardlaw v. United States, 203 F.2d 884, 885.

In accord, United States v. Murdock, 290 U.S. 389;

Hargrove v. United States, 67 F.2d 820;

Haigler v. United States, 172 F.2d 986;

Battjes v. United States, 172 F.2d 1;

Gaunt v. United States, 184 F.2d 284.

Based on the above cited authorities, we submit that the government's case in chief, failed to show the requisite wilfulness, and the evidence as a whole adds nothing to the government's case as to this basic requirement for conviction.

The fact that the jury, in acquitting the defendant for the years 1960 and 1961, based on almost identical substantive proof,

indicates further that the jury was unconvinced as to this element.

CONCLUSION

It is respectfully submitted that the conviction of the defendant herein for the years 1962 and 1963 (Counts III and IV) of the subject indictment be reversed or in the alternative that this case be remanded for a new trial for the reasons set forth above.

Respectfully submitted,
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By: ARTHUR S. KATAYAMA
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Arthur S. Katayama
ARTHUR S. KATAYAMA